IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1374 OF 1989

Sanghvi Swiss Refills Pvt.
Limited, 18, Subhash Road,
Vile Parle, East,
Bombay - 400 057 .. Petitioner.

V/s.

1. Smt.Arti Handa,
Asstt. Commissioner of
Income Tax, Central Circle
XIX, Bombay having her
office at Old C.G.O.
Building, Maharshi Karve
Road, Bombay

2. The Central Board of
Direct Taxes, constituted
under the Central Boards
of Revenue Act, 1963 and
having its office at North
Block, New Delhi .. Respondents.

Mr.J.D. Mistry i/b. Rajesh Shah & Co. for the petitioner.

Dr.P. Daniel i/b. H.D. Rathod for the respondents.

CORAM : V.C. DAGA &
J.P. DEVADHAR, JJ.

DATED : 22ND AUGUST, 2005.

ORAL JUDGMENT (Per V.C. Daga, J.) :

1. In this petition, the petitioners are challenging the notices dated March 30, 1989 for reopening of the assessment for the assessment years 1975-1976, 1976-1977 and 1977-1978 issued by the respondent No.1 under Section 148 of the Income Tax

Act, 1961 (‘the Act’ for short).

FACTS :

2. The petitioners are engaged in the business of manufacture of ball pens and refills. The petitioners manufacturing process involves inter alia the machining of brass wire/rods so as to produce tips, nozzles and rings for ball point pens and refills.

3. The petitioner had filed their return of income for the assessment years 1975-76, 1976-77 and 1977-78 giving particulars required for assessment.

4. The returns of income were assessed by the Income Tax Officer on June 30, 1974, March 24, 1979 and July 23, 1979 under Section 143(3) read with section 144B for the assessment years 1975-76, 1976-77 and 1977-78 respectively.

5. After the aforesaid assessment orders were passed, the Assistant Commissioner of Income Tax, Central Circle- II issued notices dated February 21, 1989 under Section 148 of the Income Tax Act, 1961 for reopening assessments for the assessment years 1975-76, 1976-77 and 1977-78. Reasons for re-opening the assessment for all the years is more or less

identical. Reasons recorded for re-opening the assessment for A.Y. 1975-76 reads as under :

Name of the assessee : M/s.Sanghvi Swiss Refills P. Ltd.
Assessment Year : 1976-76

1. Search and seizure operations under section 132 of the I.T. Act were carried on 27.9.88 at the business and residential premises of various persons belonging to wilson group. The cases falling in his group are :

1. M/s.Balkrishna Pen P. Ltd.
2. M/s.Sanghvi Swiss Refills P. Ltd.
3. M/s.Kiron & Co.
4. M/s.Nibs India
5. Shri D.J. Sanghvi
6. Shri J.D. Sanghvi
7. Shri K.D. Sanghvi
8. Shri B.D. Sanghvi
9. Shri Ashok D. Sanghvi

2. During the course of search operations directors/partners of the concerns belonging to the group and the employees were examined. Their statements u/s.132(a) were also recorded.

3. The main business of the assessee is manufacture of pen and pen parts. The raw materials consumed in this business include brass-wire, brass-rod, brass strips, plastic powder, stainless steel balls and tips, and ink.

4. It was noticed during the search operation that the brass scrap and plastic powder scrap generated in the manufacturing process is of significant quantity and value. On the basis of the observations made from the statements of directors/partners who were examined u/s.132(4) and from the manufacturing process carried out before the search party, it is noticed that the brass scrap is about 5% of the total consumption of brass items - wire rod and strips - and plastic scrap can be as much as 12% of the consumption of plastic powder.

5. In the accounts for the previous year relevant to the assessment year 1975-76, the assessee had not shown any value of scrap either by way sale or in stock. The suppression of profits by non-disclosure of scrap in the accounts is worked out as under :

Item	Consumption	Scrap	
		Qty.	Value(Rs.)
Brass	14983 Kg.	6742.35 Kg	94,392
Plastic powder	10872.25 Kg.	1394.67 Kg	11,142

The value of scrap as above has been computed by applying the average rate of consumption of raw material for the relevant previous year, the same ratio between the raw material consumption rate and the scrap sale price noticed during the assessment proceedings in the group for the A.Y. 1986-87.

6. Another fact that comes out during the search and seizure operation is that the assessee is using very sophisticated machine for the consumption of stainless steel balls and the efficiency of the machine is such that not a single balls is wasted in the manufacturing process. During the year consumption of stainless steel balls has been shown at 28507000 pcs. The production recorded in the bills of account is only 15415776 refills. Thus, there was suppression of sale of 13097224 pcs. of refills. The value of this suppressed sales works out to Rs.12,27,299/-.

7. In view of the above, I have reason to believe that by reason of failure on the part of the assessee to disclose the income from sale of scrap and also the income from sale of excess production, income to the extent of Rs.13,32,833/- has escaped assessment within the meaning of section 147(a) of the I.T. Act, 1961. It is, therefore, requested that approval u/s. 151(a) of the I.T. Act, 1961 may kindly be accorded to issue the notice u/s.148 read with section 147(a) of the I.T. Act, 1961 for the assessment year 1975-76 in this case.

sd/-
(SMT. ARTI HANDA)
A.C., Central Curcle 19, Bom.

6. Notices issued under Section 148 of the Income Tax Act are the subject matter of challenge in this petition filed under Article 226 of the Constitution of India.

7. On being noticed, the respondents appeared and filed their counter affidavit and submitted that the respondents be permitted to adjudicate upon the notices issued under Section 148 of the Act.

SUBMISSIONS :

8. Firstly, the learned counsel for the petitioner submitted that the notices under Section 148 of the Act can be issued beyond the period of four years only if there is failure on the part of the assessee to disclose fully and truly all the material facts in the return filed by the petitioners.

9. The learned counsel for the petitioner further submitted that in the present case, all material particulars as were necessary for completing the assessment of the income of relevant assessment years were disclosed in the respective returns of income filed by them. He further submits that the power to reopen could not have been exercised for the assessment years in question considering the peculiar facts and circumstances of this case since entire material was available on record of the Income Tax Officer. He submitted that the basis for re-opening the assessment is that during the course of search

and seizure operation it was noticed that during the course of manufacture, significant quantity of brass scraps plastic powder scrap was generated but the same were not accounted for. The learned counsel submitted that during the assessment proceedings the assessing officer did enquire into the generation of scrap generated during the manufacturing process as can be seen from the assessment order itself (see page 155). Once the explanation given by the petitioner is accepted by the assessing officer, it is not open to the succeeding officer to re-open the assessment merely because he disagrees with the views expressed in the original assessment order.

10. The learned counsel for the petitioner further submitted that the dispute regarding the consumption of stainless steel balls is also without any substance because there is no dispute regarding the quantity shown in the opening balance and the closing balance recorded in the books maintained by the petitioner. There is no dispute regarding the quantity of ball pen manufactured and cleared by the petitioner. Therefore, on hypothetical basis it is not open to the assessing officer to allege that the petitioner has failed to disclose all material facts. Under these circumstances, the allegations made in the notice that there was failure on the part of the

assessee to disclose the particulars are nothing but a contradiction on the part of the respondent No.1. With the aforesaid submission, the learned counsel appearing for the petitioner submits that the notices in question are liable to be quashed and set aside.

11. Per contra, the learned counsel appearing for the respondents submits that the notices issued under Section 148 of the Act answer the requirement of Section 147 read with Section 148 along with Section 149A(ii) of the Act. He further submits that there was failure apparent on the part of the assessee to truly and fully disclose the correct factual material for completing the assessment of the assessee for the relevant assessment years. He thus tried to support the action of reopening.

STATUTORY PROVISION :

12. Before considering the rival submissions, it would be useful to reproduce relevant statutory provisions of Section 147 and 149A(ii) of the Act.

> Section 147 (As it stood prior to April 1, 1989) :
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> If -
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> (a) the Assessing Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment

year to the Assessing Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Assessing Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year,

he may, subject to the provisions of sections 148 to 153, assessee or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in sections 148 to 153 referred to as the relevant assessment year).

Section 149 (As it stood prior to April 1, 1989) :

(1) No notice under section 148 shall be issued.

(a) in cases falling under clause (a) of section 147 -

(i) for the relevant assessment year, if eight years have elapsed from the end of that year, unless the case falls under sub-clause (ii);

(ii) for the relevant assessment year, where eight years, but not more than sixteen years, have elapsed from the end of that year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees fifty thousand or more for that year;

(b) in cases falling under clause (b) of section 147, at any time after the expiry of four years from the end of the relevant assessment year."

CONSIDERATION :

13. Having heard the rival parties and having seen the text of Section 147 and Section 149, referred to hereinabove, it is clear that the reasons for re-opening the assessment on the ground that there is failure on the part of the assessee to disclose fully and truly all material facts are unsustainable. As rightly contended by the learned counsel for the petitioner, the issue of scrap arising during the manufacturing process was in fact raised by the assessing officer at the time of original assessment and the assessing officer has accepted the version given by the petitioner. It is also not disputed that the scrap collected during the manufacturing process whenever sold in the subsequent years has been accounted for and the same has been accepted by the assessing officer. Therefore, it cannot be said that scrap arising in the manufacturing process was not disclosed during the course of original assessment. Hence, re-opening of the assessment on the ground that the assessee has failed to disclose the scrap arising during the manufacturing process cannot be sustained.

14. Similarly, the re-opening of the assessment on the ground that the assessee has suppressed the production of ball pens is also baseless because the quantity of stainless steel balls in the opening

stock and the closing stock shown in the books of account maintained by the assessee have been found to be correct. Therefore, merely because the number of stainless steel balls utilised during the manufacturing process is more than the number of balls pens manufactured, it cannot be presumed that the assessee has misdeclared the number of ball pens manufactured by it. Moreover, for the assessment years in question, the assessee had approached the Commissioner of Income Tax, Central-II, Bombay for overall settlement in the group cases of the assessee and the Commissioner of Income Tax had finalised the terms of settlement by his note dated March 31, 1980. In these circumstances, we are of the opinion that the re-opening of the assessment on the ground that there is failure on the part of the assessee to disclose fully and truly all material facts cannot be sustained. Reopening on the basis of change of opinion is not permissible. Since the notices itself are based on the the material supplied by the petitioner at the time of initial assessment along with its returns of income, it was not open for the assessing officer to reopen the assessment for the assessment years in question.

15. In that view of the matter, the notices in question are quashed and set aside holding it to be

bad and illegal. Rule is made absolute in terms of this order with no order as to costs.

(V.C. DAGA, J.)

(J.P. DEVADHAR, J.)